Detroit Newspapers Agency, d/b/a Detroit Newspapers *and* Detroit Mailers Union No. 2040 International Brotherhood of Teamsters, AFL–CIO; Teamsters Local No. 372, International Brotherhood of Teamsters, AFL–CIO *and* Local Union No. 13N, Graphic Communications International Union, AFL–CIO

The Detroit News, Inc. *and* The Newspaper Guild of Detroit, Local 22, The Newspaper Guild, AFL–CIO. Cases 7–CA–40759, 7–CA–40943, and 7–CA–40944

January 21, 2000

ORDER DENYING MOTIONS

BY CHAIRMAN TRUESDALE AND MEMBERS FOX AND HURTGEN

On July 19, 1999, in Cases 7–CA–40759, 7–CA–40943, and 7–CA–40944, the General Counsel of the National Labor Relations Board issued a consolidated complaint alleging that the Respondents violated Section 8(a)(3) and (1) of the Act by discharging 59 employees for engaging in protected strike activity against the Respondents.

On August 10, 1999, the Respondents filed a motion to dismiss the consolidated complaint. On August 23, 1999, the Board issued a Notice to Show Cause why the motion should not be granted. The Respondents filed a supporting brief and the General Counsel and the Charging Parties Unions each filed responses. Thereafter, on December 13, 1999, the Respondents filed a second motion to dismiss and supporting brief, and the General Counsel filed a response.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

For the reasons set forth below, we deny the Respondents' motions to dismiss.[1]

Procedural History

On July 13, 1995, six unions representing approximately 2000 employees went on strike against the Detroit Newspaper Agency (DNA), the Detroit News, and the Detroit Free Press.[2] The strike lasted until February 1997, when the unions made an unconditional offer to return to work. During the course of the strike, numerous employees were discharged or otherwise disciplined. Between January 24, 1996, and October 6, 1997, the Charging Party Unions filed unfair labor practice charges regarding the discipline and discharges of strikers for alleged strike-related misconduct between July 26, 1995, and September 15, 1997. The General Counsel thereafter issued consolidated complaints in Cases 7–CA–38079, et al., alleging that certain of these striking employees were disciplined or discharged because of their concerted protected activity related to the strike. The hearing on the consolidated complaints was held before Administrative Law Judge Richard Scully from April 7, 1997, to September 23, 1998, and continued thereafter from November 30, 1998, to March 18, 1999, to take record evidence regarding five additional discriminatees whom the judge had allowed to be added to the complaint. On December 17, 1999, the judge issued his decision.[3]

The charges in the instant proceeding were filed during the course of the hearing in the foregoing proceeding based on evidence obtained during that proceeding. The charges allege that Respondents DNA and Detroit News unlawfully discharged a number of additional strikers while issuing lesser forms of discipline to nonstrikers for comparable or more severe alleged misconduct. All of the discharges alleged in these charges occurred more than 6 months before the filing of the charges.

Based on these additional charges, on September 23, 1998, the last day of the hearing in Cases 7–CA–38079, et al., the General Counsel moved to amend the consolidated complaints in that proceeding to add 77 additional discriminatees. The Respondents opposed the motion noting that there had already been numerous amendments and consolidations, that the hearing had already lasted over a year and a half, and that reopening the hearing to litigate the additional discriminatees would unduly prolong the trial even further. The judge denied the General Counsel's motion, finding no good cause for amendment, and the Board subsequently denied the General Counsel's request for special permission to appeal the judge's ruling on the ground that no abuse of discretion had been shown. The Board noted, however, that it did not pass on whether the allegations sought to be added were barred by Section 10(b) or whether the allegations could be properly pled and litigated separately.

Thereafter, on July 19, 1999, the Regional Director issued the instant complaint and notice of hearing alleging that Respondent DNA discharged 58 employees and Respondent Detroit News discharged 1 employee because of their assistance to the Charging Party Unions and because they engaged in concerted protected activity by ceasing work and engaging in a strike against the Respondents. These discriminatees were part of the group of discriminatees that the General Counsel had sought to include by amendment to the consolidated complaints in Cases 7–CA–38079, et al., in its motion of September 23, 1998. The complaint alleges that the allegations are not barred by Section 10(b) since they are "closely related" to the pending timely-filed charges in Cases 7–CA–38079, et al., under *Redd-I, Inc*., 290 NLRB 1115 (1988).

[1] The Respondents' request for oral argument, which the General Counsel has opposed, is also denied as the pleadings adequately present the issues and positions of the parties.

[2] In *Detroit Newspapers*, 326 NLRB 700 (1998), the Board found the strike to be an unfair labor practice strike and the strikers to be unfair labor practice strikers or in sympathy with such strikers.

[3] The time period for filing exceptions has not yet run.

On August 10 and December 13, 1999, Respondents DNA and Detroit News filed the instant motions to dismiss with the Board.[4] In their first motion, the Respondents contend that the allegations of the complaint are barred by Section 10(b) because they are not contained in a timely filed charge. The Respondents argue that the "closely related" doctrine under *Redd-I* exceeds the Board's authority and, in any event, is inapplicable here since the charges in Cases 7–CA–38079, et al., have already been fully litigated and the record in that proceeding is closed. The Respondents also contend that the new allegations are barred by the policy against piecemeal litigation. In their second motion, the Respondents contend that Section 10(b) also bars the complaint as to 11 of the alleged discriminatees because these individuals were not identified in any underlying charge.

Analysis and Discussion

The Board has held that the General Counsel may add complaint allegations that would otherwise be barred from litigation by Section 10(b) of the Act[5] if the allegations are closely related to allegations of a timely filed charge. *Redd-I,* supra. The Board's test for determining relatedness was summarized in *Nickles Bakery of Indiana,* 296 NLRB 927, 928 (1989):

First, the Board will look at whether the otherwise untimely allegations involve the same legal theory as the allegations in the pending timely charge. Second, the Board will look at whether the otherwise untimely allegations arise from the same factual circumstances or sequence of events as the pending timely charge. Finally, the Board may look at whether a respondent would raise similar defenses to [the] allegations. [footnotes omitted].

Applying this test,[6] we find that the Respondents have failed to establish that summary dismissal is warranted.[7] First, both sets of allegations share a common legal theory based on the alleged discrimination against the discharged employees.[8] Second, both sets of allegations share similar factual circumstances: each alleged discharge arose out of the same strike, involve the same types of asserted strike related misconduct and the Respondents used the same system to gather evidence relating to the alleged misconduct and to make their discharge decisions. Further, the Charging Parties are the same and two of the Respondents named in the instant complaint were named in the underlying consolidated complaints. Third, the Respondents are likely to raise the same defense to the instant complaint as they have maintained in litigating the underlying complaint, namely that the discharges were all lawfully based on strikers' unprotected picket line misconduct. We also note that at least five of the alleged discriminatees in the instant complaint were discharged for incidents that were litigated in the earlier proceeding.

Based on the pleadings and the contentions of the parties, we find the complaint allegations to be closely related to the timely charge allegations in Cases 7–CA–38079 et al.

We further find that the General Counsel has not engaged in impermissible piecemeal litigation by litigating these discharges in two separate proceedings. The Board does not require that an unfair labor practice charge filed during the pendency of another unfair labor practice proceeding concerning the same Respondent be consolidated into that proceeding. *Frontier Hotel & Casino*, 324

[4] The Respondents also filed a complaint and motion in Federal district court seeking to enjoin the prosecution of the instant unfair labor practice proceeding. The district court action alleges that the issuance of the instant complaint and notice of hearing is contrary to the expressed statutory mandate of Sec. 10(b) and the litigation should be barred under *Leedom v. Kyne*, 358 U.S. (1958). On September 9, 1999, the district court issued an order canceling the injunction hearing and declaring that all further district court proceedings would be held in abeyance until the Board had made its determination concerning jurisdiction.

[5] Sec. 10(b) provides in pertinent part that "no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made . . . ."

[6] We reject the Respondents' assertion that the Board's closely-related doctrine exceeds the Board's statutory authority under Sec. 10(b). The Supreme Court has held that the Board can issue complaints on uncharged allegations when they are of "the same class of violations as those set up in the charge" and that Sec. 10(b) does not preclude the Board from "dealing adequately with unfair labor practices which are related to those alleged in the charge and which grow out of them while the proceeding is pending before the Board." *National Licorice v. NLRB*, 309 U.S. 350, 369 (1940), quoted in *NLRB v. Fant Milling Co*., 360 U.S. 301, 307 (1959). Indeed, several circuit courts of appeals have approved the Board's specific *Redd-I* test. See *Don Lee Distributor, Inc. (Warren) v. NLRB*, 145 F.3d 834, 844 (6th Cir. 1998); *FPC Holdings, Inc. v. NLRB*, 64 F.3d 935 (4th Cir. 1995); *Teamsters Local 170 v. NLRB*, 993 F.2d 990 (1st Cir. 1993); and *NLRB v. Overnite Transportation Co*., 938 F.2d 815 (7th Cir. 1991). For the reasons discussed, infra, with respect to the Respondents' contention that the complaint violates the policy against piecemeal litigation, we also reject the Respondents' contention that the "closely related" doctrine is inapplicable in the circumstances of this case.

[7] In ruling on a motion to dismiss under Sec. 102.24 of the Board's Rules, the Board construes the complaint in the light most favorable to the General Counsel, accepts all factual allegations as true, and determines whether the General Counsel can prove any set of facts in support of his claims that would entitle him to relief. See generally *Andrews v. State of Ohio*, 104 F.3d 803, 806 (6th Cir. 1997) (discussing FRCP 12(b)(6)). See also *Conley v. Gibson*, 355 U.S. 41, 45–46 (1957). Under this standard, we accept the version of events as stated in the General Counsel's pleadings. Our denial of the Respondents' motions for dismissal, however, does not preclude the Respondents from raising their 10(b) arguments before the administrative law judge assigned to these cases.

[8] While not necessary to a finding of relatedness under the test of *Redd-I* and *Nickles Bakery*, Chairman Truesdale and Member Fox note that both the allegations of the instant complaint and the underlying consolidated complaints involve the same section of the Act. *Ross Stores,* 329 NLRB 573 (1999).

Member Hurtgen dissented in *Ross Stores*. However, here, unlike *Ross Stores*, the complaint allegations at issue involve the same sections of the Act as the timely filed charges as well as the same types of conduct (discipline of striking employees for purported strike misconduct). For these reasons, and those set forth above, Member Hurtgen agrees that the Respondents have not established, at this juncture, that dismissal of the complaint is warranted on 10(b) grounds.

NLRB 1225, 1226 (1997). Such a rule would improperly interfere with the General Counsel's discretion and allow an employer to indefinitely delay the ultimate litigation of a charge. *Harrison Steel Castings Co.,* 255 NLRB 1426, 1427 (1981). It is true that the General Counsel's discretion is not unlimited. Thus, the Board will generally not permit the General Counsel to relitigate the lawfulness of the same act or conduct as a violation of different sections of the Act or to relitigate the same charges in different cases. *Service Employees Local 87 (Cresleigh Management),* 324 NLRB 774, 775 (1997) (discussing *Jefferson Chemical Co.,* 200 NLRB 992 (1972), and *Peyton Packing Co.,* 129 NLRB 1358 (1961)). However, contrary to the Respondents' assertion, in the instant proceeding the General Counsel does not seek to litigate discharges under different sections of the Act or include discharges that were alleged and litigated in a prior proceeding. Although, as noted above, some of the incidents leading to the discharges were litigated in a prior proceeding, none of the discharges of the discriminatees alleged in the instant complaint have been previously litigated.

Here, as indicated above, the General Counsel sought to litigate the instant allegations in the prior proceeding, but the Respondents opposed the General Counsel's motion, the judge denied it, and the Board denied the General Counsel's special appeal. We find that the judge's denial of the General Counsel's earlier motion to amend the complaint leaves the General Counsel free to litigate the rejected allegations in the instant proceeding. Where as here the Respondents opposed the General Counsel's earlier motions to amend the underlying consolidated complaint, they cannot now claim that it is a breach of due process to have two separate hearings.[9]

Finally, we also reject the Respondents' contention in their second motion to dismiss that 11 of the alleged discharges are barred by Section 10(b) because they were not mentioned in any charge. As discussed above, we find that all of the additional alleged discharges in the complaint are closely related to the timely charge allegations in Cases 7–CA–38079 et al., and are therefore not time-barred regardless of whether they were specifically mentioned in any charge. Moreover, we agree with the General Counsel that the Respondents had sufficient notice that the 11 alleged discriminatees were at issue. Initially, we note that the Respondents admit receiving a copy of the amended charge in Case 7–CA–40759, which referred to an attached list of discriminatees.[10] Although the Respondents assert that no such list was actually attached, the General Counsel states that the Respondents failed to notify the Regional Office that the attachment was not received. The General Counsel further notes that the Respondents failed to assert this claim in either their August 10, 1999 answer or their August 11, 1999 amended answer; nor did they raise this issue in their district court action or in their first motion to dismiss filed with the Board on August 10, 1999. The General Counsel asserts that the Respondents raised the issue for the first time on December 1, 1999, and on December 9 the Regional Office served another copy of the amended charge and attachment on the Respondent. Finally, the General Counsel notes that, in their district court pleadings, the Respondents specifically referred to the 11 individuals at issue as "individuals who are listed in charge numbers 7–CA–40759, 7–CA–40944 and 7–CA–40943."

In sum, we find that the Respondents have not demonstrated that the General Counsel's issuance of the instant complaint is untimely under Section 10(b) of the Act or otherwise beyond its discretion. Therefore, we deny the Respondents' motions to dismiss.

ORDER

The motions to dismiss are denied.

IT IS FURTHER ORDERED that Cases 7–CA–40759, 7–CA–40943, and 7–CA–40944 are remanded to the Regional Director for further action consistent with this Order.

[9] We also reject the Respondents' contention that the issuance of the instant complaint will result in undue delay and prejudice to the Respondents because of the unavailability of witnesses and possible destruction of documents. The General Counsel's earlier motion to amend the consolidated complaint in Cases 7–CA–38079, et al., provided the Respondents with sufficient notice of the allegations. See *Maremount Corp.*, 249 NLRB 216, 217 (1980). We also note the General Counsel's assertion that the Respondents have known about the Regional Director's consideration of these additional allegations since March 1998 when the Unions requested the Region to review additional discharges under a disparate treatment theory. At that time, the Region requested a response to the allegations from the Respondents. The General Counsel also asserts that, as a result of the Respondents' resistance to producing subpoenaed documents and the time required to obtain those documents through enforcement remedies, the disparate treatment issue could not be fully considered or fairly raised until late in the hearing on the underlying consolidated complaint.

[10] The amended charge contained in the records of the Regional Office includes an attachment listing the names of 62 alleged discriminatees: 51 alleged discriminatees listed on the attachment to the original charge and the 11 alleged discriminatees at issue.